Nos. 78-1389 and 78-1415

In the Supreme Court of the United States

OCTOBER TERM, 1978

JEFFREY G. DYAR, PETITIONER

v.

UNITED STATES OF AMERICA

RAY ANTHONY HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
FRANK J. MARINE
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Hall Pet. App. A-1 to A-12) is reported at 587 F. 2d 177.

JURISDICTION

The judgment of the court of appeals (Hall Pet. App. A-13) was entered on January 2, 1979. Petitions for rehearing were denied on February 15, 1979 (Pet. App. A-14). The petition for a writ of certiorari in No. 78-1389 was filed on March 12, 1979, and the petition in No. 78-1415 was filed on March 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence of certain criminal acts not charged in the indictment was properly admitted.

2. Whether consent to a search was voluntary.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of kidnaping, in violation of 18 U.S.C. 1201. Petitioners were each sentenced to six years' imprisonment. The court of appeals affirmed, with one judge dissenting (Hall Pet. App. A).

The evidence at trial showed (Hall Pet. App. A-3 to A-8) that petitioners and Johnny Edmond kidnaped William Court Katker, transported him across a state line, and held him for ransom. Petitioners told Katker that a man named "Omar" owed them $13,250 and that they were going to use Katker as an "insurance policy" to ensure payment of this debt (Hall Pet. App. A-4 to A-5).

Petitioners' defense at trial was that Katker made no attempt to escape and was a willing participant in the attempt to collect from Omar, and that therefore no kidnaping took place (Hall Pet. App. A-9).

ARGUMENT

1. Petitioners contest (Dyar Pet. 4-5; Hall Pet. 10-11) the admission at trial of Katker's testimony that petitioner Dyar boasted to him that petitioners and others, armed with machine guns, had broken into Omar's house and would have killed anyone they found there (Hall Pet. App. A-9).[1] Petitioners contend

[1]The dissenting judge below did not take issue with admission of this evidence (see Hall Pet. App. A-11 to A-12).

that even if this evidence were relevant to show that Katker had reason to be afraid of petitioners and their companion, such evidence cannot be admitted to prove a witness's state of mind. They urge that evidence of criminal acts not charged in the indictment can be admitted only to show the defendants' motives or conduct.

But there is no such limitation on use of evidence of "other crimes." While such evidence is excluded as a means "to prove the character of a person in order to show that he acted in conformity therewith" (Fed. R. Evid. 404(b)), it is admissible for any "other purposes" for which it is relevant (*ibid.*; Fed. R. Evid. 402). Katker's testimony about the related crime was highly relevant to prove an element of the offense—that the victim was held against his will. See *United States* v. *Weems*, 398 F. 2d 274, 275 (4th Cir. 1968), cert. denied, 393 U.S. 1099 (1969); *Holden* v. *United States*, 388 F. 2d 240, 242 (1st Cir. 1968). Since the district court determined in its discretion that the probative value of the evidence outweighed any prejudice to petitioners, it was properly admitted.[2]

2. Petitioner Hall argues (Pet. 8-10) that a warrantless search of his residence violated the Fourth Amendment because his wife's consent to the search was coerced by federal agents, and he contends that the court below erred in applying the harmless error doctrine to admission of the fruits of the search.

Approximately 15 minutes after petitioner and his accomplices were arrested and Katker was rescued by FBI agents, the agents went to petitioner Hall's

[2]Petitioner Dyar incorrectly added the word "not" in reprinting a portion of the court of appeals' opinion. The last sentence of the second paragraph appearing at Dyar Pet. App. 11a should read: "The evidence here was admissible to show [Katker's] motive in not attempting to escape when there were apparent opportunities to do so."

house, where Katker had been held captive, to determine whether any other participants in the kidnaping were still there (Hall Pet. App. A-7 to A-8, A-10).[3] The agents had information that a telephone message recording device might be in the house (Tr. 16, 27) and that there also might be M-16 rifles (Tr. 16).

The FBI agents identified themselves, and Mrs. Hall permitted them to enter her house (Tr. 11, 13-14, 43-44). The agents explained to Mrs. Hall that her husband and two others had been arrested approximately 15 minutes earlier on kidnaping charges (Tr. 11, 15, 37-39). The agents then conducted a very brief "protective search" of the house to determine whether other participants in the kidnaping were there, and for their own security (Tr. 15-17, 33, 45). Although agents observed a telephone recording device, nothing was seized during this brief search, which took less than five minutes (Tr. 17, 45).

FBI agents then explained to Mrs. Hall that they did not have a search warrant and that she had a right not to speak with them and to refuse to consent to their further search of her house. Mrs. Hall asked what would happen if she refused to consent. The agents replied that they would leave her house, station observers outside, and "would attempt to obtain a search warrant" from a magistrate. However, the agents emphasized that only a magistrate could determine whether they were entitled to obtain a search warrant (Tr. 17-20, 34-35, 46-47, 57, 61).[4]

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[3]At the time they arrived at the house, the agents did not know whether others were involved in the kidnaping (Tr. 10, 15-16, 25-26, 40-45, 65).

[4]They denied Mrs. Hall's assertions (Tr. 71, 77) that they told her that it would be futile for her to refuse to consent to the search, and that the agents would remain in her house even if she refused consent (Tr. 19-20, 34-35, 57, 61).

About 20 minutes after the agents first entered the house, Mrs. Hall gave her written consent to the search, in which she stated that her consent was made "freely and without threats or coercion" (Tr. 20-23, 46-47). Thereafter the agents searched the house and seized a telephone recording device (Code-A-Phone) containing recorded conversations between the kidnapers and the victim's relatives, .30 caliber rifle ammunition, and a clip for an M-16 rifle (Tr. 47-50, 477).[5]

In these circumstances, Mrs. Hall voluntarily consented to the agents' search with full knowledge of her right to withold her consent. Accordingly, the seizure of the various items was lawful. See, *e.g.*, *United States* v. *Matlock*, 415 U.S. 164, 169-172 (1974); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227, 246-249 (1973); *United States* v. *Agosto*, 502 F. 2d 612, 614 (9th Cir. 1974), and cases cited.[6]

In any event, it is not necessary to address the adequacy of Mrs. Hall's consent since, as the court of appeals held (Hall Pet. App. A-11), any error in

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[5]Only the recordings were introduced at trial.

[6]Petitioner does not contest that Mrs. Hall's initial consent, allowing the agents to enter the house, permitted the brief protective search of the house in which they confirmed that a recording device was attached to the telephone. In any event, her written consent to the second search was adequate to authorize that search, and the seizure of the recording device. *United States* v. *Galante*, 547 F. 2d 733, 741-742 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Mullens*, 536 F. 2d 997, 999-1000 (2d Cir. 1976); *Davis* v. *People of State of California*, 341 F. 2d 982, 985 (9th Cir. 1965); cf. *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975).

admission of the taped conversations was harmless.[7] Petitioner Hall complains, however, that the court below misapplied the harmless error doctrine because instead of holding that the error was "harmless beyond a reasonable doubt" (*Chapman* v. *California*, 386 U.S. 18, 24 (1967); see also *Blackburn* v. *Cross*, 510 F. 2d 1014, 1019-1020 (5th Cir. 1975); *Vaccaro* v. *United States*, 461 F. 2d 626, 634-639 (5th Cir. 1972)), it stated that the error was harmless "in view of the other overwhelming evidence which established guilt beyond any doubt" (Hall Pet. App. A-11).

But there is no material difference in this case between these standards. Since, as the court below held, evidence other than the tapes established petitioner's guilt "beyond any doubt," the evidence contained in the tapes was simply surplusage. In these circumstances, the error in admitting the tapes, if any, could not have affected the verdict, and accordingly was "harmless beyond a reasonable doubt." *Chapman* v. *California, supra*, 386 U.S. at 24.

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[7]There is no reasonable possibility that the evidence complained of might have contributed to the conviction, since other evidence of guilt was so strong. The agents observed petitioner Hall leave his house with the kidnap victim and drive away; the agents followed them and arrested Hall while he was still holding Katker captive (Tr. 439-441).

Further, the conversations on the tapes were merely cumulative of testimony at trial by Katker's relatives as to the substance of the conversations (Tr. 310-321, 479-488).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
FRANK J. MARINE
Attorneys

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